

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION \_\_\_\_

IN THE MATTER OF: [name	)	
of Superfund Site]	)	
	)	[ Docket Number]
	)	
UNDER THE AUTHORITY OF THE	)	AGREEMENT AND COVENANT
COMPREHENSIVE ENVIRONMENTAL	)	NOT TO SUE [Insert Settling
RESPONSE, COMPENSATION, AND	)	Respondent's Name]
LIABILITY ACT OF 1980, 42 U.S.C.	)	
§ 9601, <u>et seq.</u> , as amended.	)	
[state law, if appropriate]	)	

I. INTRODUCTION

This Agreement and Covenant Not to Sue (“Agreement”) is made and entered into by and between the United States on behalf of the Environmental Protection Agency (“EPA”) [state of \_\_\_\_] and \_\_\_\_\_ [insert name of Settling Respondent] (collectively the “Parties”).

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9601, et seq. [If the state is a party, insert “The State of \_\_\_\_\_, enters into this Agreement pursuant to [cite relevant state authority.]” and make appropriate reference to state with respect to affected provisions, including payment or work to be performed] and the authority of the Attorney General of the United States to compromise and settle claims of the United States.

[Provide introductory information, consistent with Definitions and Statement of Facts, about the party purchasing the contaminated property including, name (“Settling Respondent”), address, corporate status if applicable and include proposed use of the property by prospective purchaser. Provide name, location and description of Site.]

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VII, VIII, IX, and X [If this Agreement contains a separate section for Settling Respondent's reservations, add section number], the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the Property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA [and the state] of a substantial benefit, is in the public interest.

## II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

1. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

2. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants, present or existing on or under the Site as of the effective date of this Agreement. [When defining "Existing Contamination," determine if the difference in size between "Site" and "Property" is such, with Property much smaller than Site, that the Covenant Not to Sue should be appropriately limited to the "Property." If so, substitute the following language. "Existing

Contamination” shall mean:

a. any hazardous substances, pollutants or contaminants present or existing on or under the Property as of the effective date of this Agreement;

b. any hazardous substances, pollutants or contaminants that migrated from the Property prior to the effective date of this Agreement; and

c. any hazardous substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the effective date of this Agreement.]

3. “Institutional Controls” shall mean [when Institutional Controls are part of the consideration for the Agreement, it may be appropriate to use language from the Model CD for RD/RA to ensure enforceable institutional controls provisions. It may be necessary to use a separate agreement for the specific Institutional Controls being required. The Access/Notice provisions in Section V have also been changed pursuant to recommendation of the Institutional Controls Workgroup.]

4. “Parties” shall mean the United States on behalf of EPA [State of \_\_\_\_\_], and the Settling Respondent.

5. “Property” shall mean that portion of the Site, encompassing approximately \_\_\_\_ acres, which is described in Exhibit 1 of this Agreement.

6. “Settling Respondent” shall mean \_\_\_\_\_.

7. “Site” shall mean the [Superfund] Site encompassing approximately \_\_\_\_\_ acres, located at [address or description of location] in [name of city, county, and State], and depicted generally on the map attached as Exhibit 2. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located [provide a

more specific definition of the Site where possible; may also wish to include within Site description structures, USTs, etc].

8. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

### III. STATEMENT OF FACTS

9. [Include only those facts relating to the Site that are relevant to the covenant being provided the prospective purchaser. Avoid adding information that relates only to actions or parties that are outside of this Agreement.]

10. The Settling Respondent represents, and for the purposes of this Agreement EPA [and the state] relies on those representations, that Settling Respondent's involvement with the Property and the Site has been limited to the following: [Provide facts of any involvement by Settling Respondent with the Site, for example performing an environmental audit, or if Settling Respondent has had no involvement with the Site so state.].

### IV. PAYMENT

11. In consideration of and in exchange for the United States' Covenant Not to Sue in Section VIII herein [and Removal of Lien in Section XXI herein, provided that is part of the consideration for this Agreement], Settling Respondent agrees to pay to EPA the sum of \$\_\_\_\_\_, within \_\_\_\_ days of the effective date of this Agreement. [Add separate Work section if the consideration is work to be performed.] The Settling Respondent shall make all payments required by this Agreement in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," referencing the EPA Region, EPA Docket number, and Site/Spill ID#\_\_\_\_\_ [insert 4-digit no.; first 2 numbers represent Region, second 2 numbers

are Region's Site/Spill ID no.], [DOJ case number\_\_\_\_\_, if applicable] and name and address of Settling Respondent. [insert Regional Superfund Lockbox address where payment should be sent]. Notice of payment shall be sent to those persons listed in Section XV (Notices and Submissions) and to EPA Region \_\_\_\_ Financial Management Officer [insert address].

12. Amounts due and owing pursuant to the terms of this Agreement but not paid in accordance with the terms of this Agreement shall accrue interest at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), compounded on an annual basis.

[\_\_\_\_\_] [WORK TO BE PERFORMED]

[Include this section and other appropriate provisions relating to performance of the work, such as financial assurance, agency approvals, reporting, etc., where work to be performed is the consideration for the Agreement.

\_\_\_\_. Statement of Work attached as Exhibit 3.]

#### V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

13. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA [and the state] its authorized officers, employees, representatives, and all other persons performing response actions under EPA [or state] oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by the Settling Respondent, for the purposes of performing and overseeing response actions at the Site under federal [and state] law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and

rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, (“RCRA”) et. seq., and any other applicable statute or regulation, including any amendments thereto.

14. With respect to any Property owned or controlled by the Settling Respondent that is located within the Site, within 15 days after the effective date of this Agreement or the date of acquisition of any Property, whichever date is later, the Settling Respondent shall submit to EPA for review and approval a notice to be filed with the Recorder’s Office [or Registry of Deeds or other appropriate office], \_\_\_\_\_ County, State of \_\_\_\_\_, which shall provide notice to all successors-in-title that the Property is part of the Site, that EPA selected a remedy the Site on \_\_\_\_\_, and that potentially responsible parties [or if Fund financed, so state] have entered a Consent Decree requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of the case, and the date the Consent Decree was entered by the Court. [Language in this paragraph may differ for pre-remedial sites. Carefully review the status of any response action for the property subject to the PPA and provide the appropriate information.] The Settling Respondent shall record the notice(s) within 10 days of EPA’s approval of the notice(s). The Settling Respondent shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice(s).<sup>1</sup>

15. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees of the Property shall provide the same access and cooperation [including any

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<sup>1</sup> Regions negotiating PPAs for Sites that may be owned by one person but controlled by another should discuss appropriate language for this Paragraph with Headquarters.

Institutional Controls]. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement [and where appropriate, Section \_\_\_ (Work to be Performed)].

## VI. DUE CARE/COOPERATION

16. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA of such

release or threatened release.

## VII. CERTIFICATION

17. By entering into this agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA [and the state] all information known to Settling Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. The Settling Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If the United States [and the state] determines that information provided by Settling Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States [and the state] reserves all rights it [they] may have.

## VIII. UNITED STATES' COVENANT NOT TO SUE<sup>2</sup>

18. Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment), of this Agreement [if consideration for Agreement is work to be performed, insert, as appropriate, "and upon completion of the work specified in Section \_\_\_ (Work to Be Performed) to the satisfaction of EPA"], the United States [and the state]

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<sup>2</sup> Since the covenant not to sue is from the United States, Regions negotiating these agreements should advise the Department of Justice if any other federal agency is involved with the Site, or of other CERCLA claim with respect to the Site and use best efforts to advise such federal agency of the proposed settlement.



covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) [and state law cite] with respect to the Existing Contamination.

#### **IX. RESERVATION OF RIGHTS**

19. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States [and the State] reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

(a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation), Section XIV (Payment of Costs, [and, if appropriate, Section \_\_ (Work to be Performed)]);

(b) any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;

(c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;

(d) any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;

(e) criminal liability;

(f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and

(g) liability for violations of local, State or federal law or regulations.

20. With respect to any claim or cause of action asserted by the United States [or the state], the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

21. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States [or the state] may have against any person, firm, corporation or other entity not a party to this Agreement.

22. Nothing in this Agreement is intended to limit the right of EPA [or the state] to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA [or the state] in exercising its authority under federal [or state ] law. Settling Respondent acknowledges that it is purchasing Property where response actions may be required.

#### X. SETTLING RESPONDENT'S COVENANT NOT TO SUE

23. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States [or the state], its authorized officers, employees, or

representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

24. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

#### XI. PARTIES BOUND/TRANSFER OF COVENANT

25. This Agreement shall apply to and be binding upon the United States, [and the state], and shall apply to and be binding upon the Settling Respondent, its officers, directors, and employees. The United States' Covenant Not to Sue in Section VIII and Contribution Protection in Section XVIII shall apply to Settling Respondent's officers, directors, or employees to the extent that the alleged liability of the officer, director, or employee is based on its status and in its capacity as an officer, director, or employee of Settling Respondent, and not to the extent that the alleged liability arose independently of the alleged liability of the Settling Respondent. Each

signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

26. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA [and the state] in its sole discretion.

27 The Settling Respondent agrees to pay the reasonable costs incurred by EPA [and the state] to review any subsequent requests for consent to assign or transfer the benefits conferred by this Agreement.

28. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA [the state] and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA [and the state].

## **XII. DISCLAIMER**

29. This Agreement in no way constitutes a finding by EPA [or the state] as to the risks to human health and the environment which may be posed by contamination at the Property or the

Site nor constitutes any representation by EPA [or the state] that the Property or the Site is fit for any particular purpose.

### XIII. DOCUMENT RETENTION

30. The Settling Respondent agrees to retain and make available to EPA [and the state] all business and operating records, contracts, Site studies and investigations, and documents relating to operations at the Property, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, the Settling Respondent shall notify EPA [and the state] of the location of such documents and shall provide EPA [and the state] with an opportunity to copy any documents at the expense of EPA [or the state]. [Where work is to be performed, consider providing for document retention for ten years or until completion of work to the satisfaction of EPA, whichever is longer.]

### XIV. PAYMENT OF COSTS

31. If the Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment), [or Section -- (Work to be Performed)] of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States [and the state] to enforce this Agreement or otherwise obtain compliance.

### XV. NOTICES AND SUBMISSIONS

32. [Insert names, titles, and addresses of those to whom notices and submissions are due, specifying which submissions are required.]

### XVI. EFFECTIVE DATE

33. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA [and the state] has fully executed the Agreement after

review of and response to any public comments received.

#### XVII. TERMINATION

34. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

#### XVIII. CONTRIBUTION PROTECTION

35. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are [all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination].

36. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States [and the state] in writing no later than 60 days prior to the initiation of such suit or claim.

37. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States [and the state] within 10 days of service of the complaint on them.

## XIX. EXHIBITS

38. Exhibit 1 shall mean the description of the Property which is the subject of this Agreement.

39. Exhibit 2 shall mean the map depicting the Site.

[--. Exhibit 3 shall mean the Statement of Work.]

## XX. REMOVAL OF LIEN

40. [Use this provision only when appropriate.] Subject to the Reservation of Rights in Section IX of this Agreement, upon payment of the amount specified in Section IV (Payment) [or upon satisfactory completion of work to be performed specified in Section \_\_ (Work to be Performed)], EPA agrees to remove any lien it may have on the Property under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), as a result of response action conducted by EPA at the Property.

## XXI. PUBLIC COMMENT

41. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

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Regional Administrator Date

Region \_\_\_\_

IT IS SO AGREED:

UNITED STATES DEPARTMENT OF JUSTICE

BY:

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Assistant Attorney General Date

Environment and Natural Resources Division

U.S. Department of Justice

IT IS SO AGREED:

BY:

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Name Date